UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

RMS TITANIC, INC., *et al.*,[1]

Debtors.

Case No. 3:16-bk-02230-PMG
Chapter 11 (Jointly Administered)

DEBTOR'S OBJECTION TO THE EQUITY COMMITTEE'S EMERGENCY DERIVATIVE STANDING MOTION AND EMERGENCY APPLICATION TO EMPLOY SPECIAL COUNSEL

RMS Titanic, Inc. and its debtor affiliates (the "Debtors") hereby object to the (a) emergency motion of the Official Committee of Equity Security Holders (the "Equity Committee") for derivative standing to prosecute litigation on behalf of the Debtors' estates (the "Motion") [D.E. 1015], and (b) emergency application to employ Robert Charbonneau and Agentis PLLC as special counsel to the Equity Committee, pursuant to Bankruptcy Code section 327(e)[2] ("Employment Application") [D.E. 1017]. The Debtors join in the objection to the Motion and the Employment Application filed by the Official Committee of Unsecured Creditors [D.E. 1023] and further respectfully state as follows:

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[1] The Debtors in the chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number include: RMS Titanic, Inc. (3162); Premier Exhibitions, Inc. (4922); Premier Exhibitions Management, LLC (3101); Arts and Exhibitions International, LLC (3101); Premier Exhibitions International, LLC (5075); Premier Exhibitions NYC, Inc. (9246); Premier Merchandising, LLC (3867); and Dinosaurs Unearthed Corp. (7309). The Debtors' service address is 3045 Kingston Court, Suite I, Peachtree Corners, Georgia 30071.

[2] The Employment Application states that it is brought under section 327(a). Proposed special counsel has agreed that any retention would appropriately be under section 327(e).

I. THERE IS NO BASIS FOR EMERGENCY RELIEF

1. The Motion purports to be brought on an emergency basis because the statute of limitations on certain claims may expire as early as June 14, 2018. There is no explanation in the Motion or letter attached to it (the "Letter") explaining why the Equity Committee waited until May of 2018 to make its demand on the Debtors, thus necessitating an emergency hearing.

2. The delay is troubling given the amount of time and resources the Equity Committee has devoted (at the estates' expense) to investigate its alleged claims. The Equity Committee began its investigation immediately upon approval of its application to retain counsel on October 13, 2016, and informed the Debtors and their insurance carriers as early as October 30, 2016, of the Equity Committee's intention to file claims. The Equity Committee issued its first subpoenas to the Debtors on December 23, 2016, and has been engaged in significant discovery on its claims ever since, issuing a second subpoena on February 13, 2017, and taking depositions of previous officers and directors. After 20 months of investigation and discovery, the Equity Committee waited until the eve of the two-year anniversary of these cases to give the Debtors only 8 days to respond to the Letter.

3. The Equity Committee's reliance on language in the Plan Support Agreement to support its emergency request is misplaced at best. The language in the Plan Support Agreement is little more than standard language to preserve estate claims. Nothing in the Plan Support Agreement specifically contemplated the claims now being alleged by the Equity Committee or prevented the Equity Committee from acting prior

to its Letter and Motion. To read the Motion, one would think the Equity Committee was caught unawares at the beginning of May that a plan will not be confirmed prior to June 14, 2018. Suffice it to say that the Equity Committee has been involved in the sale process every step of the way since the summer of 2017 and has been kept abreast of the Debtors' efforts to consummate a transaction and confirm a plan. The Equity Committee cannot claim that it is surprised that confirmation will not occur prior to June 14, and any emergency is of the Equity Committee's own making.

4. The Motion and Letter further fail to explain why the Equity Committee believes any of the alleged claims may expire on June 14, 2018. Presumably, the Equity Committee is referring to the two-year limitations period pursuant to sections 108(a) and 546(a) of the Bankruptcy Code, but there is no analysis or discussion of which claims, if any, alleged by the Equity Committee might expire pursuant to sections 108(a) and 546(a).

5. While the Motion requests standing to pursue a wide range of avoidance actions and other vaguely defined Insider, Transfer, and Miscellaneous Claims, the Equity Committee has made no showing in the Motion, Letter, or otherwise, of any specific avoidance actions that will expire on June 14, 2018. The Debtors are aware of only one potential avoidance action against potential insiders and are currently negotiating a tolling agreement with those parties to preserve such claims beyond June 14, 2018. The Equity Committee is aware that the Debtors are negotiating such a tolling agreement but omits that fact from the Motion.

6. If the Equity Committee is aware of any additional avoidance actions against insiders, or any other parties, that may expire on June 14, 2018, the Equity Committee should bring those claims to the Debtors' attention with more specificity than provided in the Motion or the Letter. Without more information regarding potential avoidance actions subject to 546(a), there is no reason the Motion needs to be decided on an emergency basis.

7. The Equity Committee should produce a complaint setting forth in detail the specific claims it intends to file. As discussed below, without such a complaint, there is no ability to conduct a proper analysis of the alleged claims. Rushing to determine derivative standing on an emergency basis without giving the parties and the Court the ability to review a complaint is wasteful and counterproductive. The Court should not rush its decision to grant derivative standing without the benefit of knowing precisely what claims the Equity Committee intends to file.

II. THE MOTION IS PREMATURE WITHOUT A COMPLAINT

8. Without providing a draft complaint(s), the Equity Committee has failed to satisfy at least two of the requirements for derivative standing. Assuming that the Eleventh Circuit would recognize derivative standing and assuming further that it would adopt the four-factor test set forth by the Equity Committee, the Equity Committee fails to show a prima facie demonstration of a colorable claim (factor three) and that the Debtors' refusal to prosecute the Estate Claims was unjustified (factor two). In the absence of a showing of either of those factors, the Motion should be denied.

A. The Equity Committee fails to make a prima facie demonstration of a colorable claim.

9. The Equity Committee's request for exclusive standing to bring all Estate Claims is far too broad and ill-defined to pass muster under a colorable claims analysis. The Equity Committee is seeking standing to assert all "Estate Claims," which are defined to include "Insider Claims, D&O Claims, Transfer Claims, and Miscellaneous Claims, and any other similar claims the Equity Committee may discover." Motion ¶ 47. Page four of the Motion further expands the request to include "all available actions" with no qualification of any kind. Effectively, the Equity Committee is asking for carte blanche permission to bring any and all claims it can think of. The Equity Committee cannot do this because it must demonstrate that its proposed claims are "colorable." *See, e.g.*, *PW Enters. v. N.D. Racing Comm'n (In re Racing Servs.)*, 540 F.3d 892, 900 (8th Cir. 2008).

10. Most courts hold that a determination of whether claims are colorable is properly assessed under the same standard as a motion to dismiss. *See, e.g.*, *id.*; *see also In re Copperfield Invs., LLC*, 421 B.R. 604, 609 (Bankr. E.D.N.Y. 2010) (gathering cases stating that the motion to dismiss standard is proper).

11. To withstand a motion to dismiss, a plaintiff must provide "the grounds of his entitle[ment] to relief" which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (formatting in original) (internal citations and quotations omitted). Analysis of claims and causes of action presupposes the existence of a

complaint. *Cf. id.* Likewise, analysis of whether claims are "colorable" logically requires the existence of a claim – set forth in a complaint. *See, e.g.*, *In re Caesars Entm't Operating Co.*, 561 B.R. 457, 465 (Bankr. N.D. Ill. 2016) ("the Committee asked permission to file and prosecute on behalf of the estates a fifteen-count complaint (a draft of which the Committee attached)"); *In re Centaur, LLC*, No. 10-10799 (KJC), 2010 Bankr. LEXIS 3918, at *12 (Bankr. D. Del. Nov. 5, 2010) ("The Committee prepared the Draft complaint . . . See Ex. A to the Standing Motion"). *See also In re Dzierzawski*, 518 B.R. 415, 420 (Bankr. E.D. Mich. 2014) ("In this case, Vulpina attached to its Motion a copy of the First Amended Complaint it filed . . . before the Debtor filed this bankruptcy case*"); Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231, 245 (6th Cir. 2009) ("Looking to the complaint that Hyundai filed in its separate district court action . . .").

12. Here, the Debtors' request for a draft complaint hardly "place[s] form over substance." Motion, at ¶ 56. Rather, reviewing a complaint is an integral component in assessing whether the claims therein are colorable (or whether there are claims at all). Yet, even assuming that the Letter or Motion is a suitable substitute for a complaint – which the Debtors dispute – the glaring omissions in the Motion and Letter make clear that they also fail to state colorable claims with respect to all categories of claims.

13. With respect to Insider Claims, Transfer Claims, and Miscellaneous Claims, the Equity Committee has failed to make any showing that it has colorable claims. The Equity Committee fails to identify a single transfer that it seeks to avoid for the

Transfer Claims. It fails to identify a single avoidance action under chapter 5 of the Bankruptcy Code that qualifies as an Insider Claim. And the Motion's list of Miscellaneous Claims provides no analysis or facts whatsoever in support. It is difficult to imagine a more thorough example of a "formulaic recitation of . . . a cause of action." *Twombly*, 550 U.S. at 555. In short, the Insider Claims, Transfer Claims, and Miscellaneous Claims are too vaguely defined to grant standing to the Equity Committee.

14. With respect to the D&O Claims, the Creditors Committee has capably demonstrated the speculative nature of those claims and why estate resources should not be expended in bringing such claims. The Debtors believe that the Creditors Committee, not the Equity Committee, is the proper party to determine whether the D&O Claims should be prosecuted.[3] Accordingly, the Debtors join in the Creditor Committees analysis of the D&O Claims and its objection to the expenditure of any estate resources to prosecute such claims (including any reimbursement of costs to counsel proposed to be employed by the Equity Committee).

B. The Debtors' refusal to prosecute the Claims was not unjustified.

15. The Equity Committee also cannot show that there was an "unjustified refusal on the part of the debtor in possession to pursue the claim." *Southtrust Bank N.A. v. Jackson (In re Dur Jac Ltd.)*, 254 B.R. 279, 285 (Bankr. M.D. Ala. 2000) (denying a

[3] The Equity Committee turns the concept of creditor fiduciary on its head when it states on page 4 of the Motion that the "Debtors have inherent conflicts of interest and have refused to act as fiduciaries for the Estates to protect the unsecured creditors. Thus, the Equity Committee should be granted standing to pursue estate claims and causes of action against the Insiders, as well as authority to settle those claims." The Creditors Committee is obviously the proper party to determine whether prosecution of claims is in the best interest of unsecured creditors, not the Equity Committee. The Debtors also dispute any allegation that it has refused to act as a fiduciary to the unsecured creditors.

creditor's motion for derivative standing where the Debtor's "refusal to bring suit . . . was justifiable under the facts of th[e] case.")

16. The Equity Committee "bears 'the initial burden to allege facts showing that the refusal to file suit is unjustified.'" *Caesars Entm't Operating Co.*, 561 B.R. at 468 (quoting *Canadian Pac. Forest Prods. v. J.D. Irving, Ltd. (In re Gibson Grp.)*, 66 F.3d 1436 (6th Cir. 1995)). A tautological allegation that the "debtors' refusal to pursue the claims . . . is unjustified because the debtors have refused to pursue them" is insufficient to support a showing of unjustified refusal. *Id.* at 469. Rather, the moving party must allege enough to permit the reviewing court to "conduct a cost-benefit analysis" to determine whether the refusal was unjustified. *Id.* at 468.

17. In doing so, the court should consider the following factors: "(1) [the] probabilities of legal success and financial recovery in event of success; (2) the creditor's proposed fee arrangement; and (3) the anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely produce." *PW Enters.*, 540 F.3d at 901 (formatting in original) (internal citations and quotations omitted). *See also Caesars Entm't Operating Co.*, 561 B.R. at 469 (quoting same).

18. Here, out of the three *PW Enterprises* factors, the Equity Committee has addressed only one: its proposed contingency fee arrangement. The Motion and Letter are both devoid of any analysis as to the probability of recovery or the anticipated delay to the bankruptcy estate. This alone is sufficient to deny any request for derivative standing. *See id.* ("the Committee's failure to address unjustifiable refusal would be reason alone to deny the motion.").

19. Moreover, the proposed fee arrangement under the Employment Application[4] shows that the fee is not purely on contingency, but would require the Debtor to reimburse costs to proposed counsel. As the Creditors Committee has argued, such costs could prove substantial. The Debtors agree that any fee arrangement requiring the estate to fund the cost of litigating the "Estate Claims" is not in the best interest of the estate and should be rejected.

20. The Debtors did not unjustifiably refuse to prosecute the Estate Claims under the circumstances of the Equity Committee's demand and this case. As discussed above, without a complaint, the Letter is far too vague to allow the Debtors to make an informed decision regarding most of the claims the Equity Committee seeks standing to bring. The Creditors Committee does not believe the D&O Claims are worth pursuing, and the Debtor agrees. Under those circumstances, the Debtors were more than justified in refusing to prosecute the claims as presented by the Equity Committee.

C. The Equity Committee should file a complaint.

21. Despite the numerous deficiencies with the Motion, the Letter, and the claims asserted by the Equity Committee, the Debtors suggest that instead of litigating these issues at this juncture in the case, the Equity Committee should file a complaint or complaints asserting any claims it believes are meritorious and subject to the statute of limitations. The Court should then stay any prosecution of such complaints while the

[4] The Debtors were not aware of the proposed counsel to prosecute the claims or the contingency fee arrangement at the time the Letter was given to the Debtors. It was not until after the Motion was filed that the Debtors learned that the Equity Committee had found counsel to take the case on a contingency basis.

Debtors, Committees, and other parties appropriately analyze whether such claims have merit and who the proper party is to prosecute any such claims.

WHEREFORE, the Debtors request that the Court deny the Motion for the reasons set forth above and grant such other relief as the Court deems proper under the circumstances.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF on May 21, 2018. I also certify that the foregoing document is being served this day on the following counsel of record via transmission of Electronic Filing generated by CM/ECF:

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